Global Climate Change and the National Environmental Policy Act

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Introduction

INTERNATIONAL CONSENSUS NOW EXISTS that the world's climate is warming and that human activity is the primary source of that change. In 2005 alone, the atmospheric concentration of carbon dioxide, the most prevalent greenhouse gas, greatly exceeded its natural range over the past 650,000 years.[1] The annual growth rate of carbon dioxide has been higher over the past decade than it has been since direct atmospheric measurements began in 1960.[2] The use of fossil fuels is generally considered the primary contributor to the world's increase in atmospheric concentration of carbon dioxide since the pre-industrial period.[3]

The Intergovernmental Panel on Climate Change ("IPCC"), established by the United Nations and World Meteorological Organization in 1988, recently issued two reports on global warming.[4] The IPCC's February 2007 report concludes, with ninety percent certainty, that human activity has been the main contributor to climate change since 1950.[5] The IPCC's April 2007 report focuses on the discernible

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1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE ("IPCC"), Working Group I, Climate Change 2007: The Physical Science Basis – Summary for Policymakers (2007) [hereinafter IPCC THE PHYSICAL SCIENCE BASIS], *available at* http://ipcc-wg1.ucar.edu/wg1/docs/WG1AR4_SPM_Approved_05Feb.pdf.

2. *See id.*

3. *See id.*

4. *See* James Kanter & Andrew C. Revkin, *Emissions Already Affecting Climate, Report Says*, N.Y. TIMES, Apr. 6, 2007, http://www.nytimes.com/2007/04/06/science/earth/06cnd-climate.html; *see also* IPCC, CLIMATE CHANGE 2007: CLIMATE CHANGE IMPACTS, ADAPTATION AND VULNERABILITY (2007) [hereinafter IPCC, CLIMATE CHANGE IMPACTS], *available at* http://www.ipcc.ch/SPM6avr07.pdf; IPCC, The Physical Science Basis, *supra* note 1.

5. *See* IPCC, The Physical Science Basis, *supra* note 1.

impacts of warming and the most effective means of mitigating such impacts.[6] Notably, the United States reportedly contributed to the most recent IPCC report.[7] Perhaps even more significantly, at the June 2007 Group of Eight Meeting in Germany, the current United States administration publicly acknowledged, on record, that global warming is a reality and that the administration would consider meeting definitive goals for the significant reduction of greenhouse gas emissions over the coming decades.[8]

The United States' participation in the IPCC's reports is notable, because the United States historically has been slow to acknowledge the causes and effects of global warming. For example, the United States, parting from the most developed nations, refused to ratify the 1997 Kyoto Protocol, which set mandatory greenhouse gas emission-reduction targets for signatory industrialized nations.[9] More recently, the United States Environmental Protection Agency ("EPA") claimed that it lacks the authority to regulate greenhouse gas emissions under the Federal Clean Air Act[10] ("CAA"), although a recent United States Supreme Court decision substantially, if not completely, undermined that position.[11] While EPA also recently acknowledged that CAA should govern the regulation of domestic greenhouse gas emissions,[12] the extent to which EPA will pursue meaningful regulation prior to the next general election remains unclear. Additionally, members of Congress have introduced a number of legislative proposals for the regulation of greenhouse gases, but again, it remains questionable whether Congress will enact any such proposals into law in the foreseeable future.[13]

6. IPCC, CLIMATE CHANGE IMPACTS, *supra* note 4.

7. *See* Kanter & Revkin, *supra* note 4.

8. *See* Michael A. Fletcher, *G-8 Leaders Back 'Substantial' Cuts in Gas Emissions – Bush Prevails Against Binding Targets*, WASH. POST, June 8, 2007, at A12.

9. For information on the Kyoto Protocol, see United Nations Framework Convention on Climate Change, Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Aug. 14, 2007).

10. 42 U.S.C. §§ 7401–7671q (2000).

11. *See* Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

12. *Bush Orders First Federal Regulation of Greenhouse Gases*, ENV'T NEWS SERV., May 14, 2007, http://www.ens-newswire.com/ens/may2007/2007-05-14-06.asp (quoting EPA Administrator Stephen Johnson's comment on a May 14, 2007 Executive Order by President Bush which directed EPA and the Departments of Transportation, Energy, and Agriculture to take initial steps toward adopting regulations to control greenhouse gas emissions from motor vehicles under the CAA and other applicable federal law).

13. Houston Chronicle Staff, *Carbon Crackdown – Congress Takes Its First Halting Steps to Confront Global Warming, Cut Emission of Greenhouse Gases*, HOUSTON CHRON., July 18, 2007, http://www.chron.com/CDA/archives/archive.mpl?id=2007_4386523. Among the bills recently introduced in the United States Senate to respond to global warming are Electric

The failure of national policy makers to take action has led a number of states and communities to address climate change on a regional or statewide basis.[14] For example, in 2006, the California state legislature passed the Global Warming Solutions Act ("Act"), making California the first state to mandate enforceable limits on greenhouse gas emissions.[15] The Act requires statewide greenhouse gas emissions to be reduced to 1990 levels by the year 2020.[16] Pursuant to the Act, the California Air Resources Board ("CARB") is required to develop early implementation strategies for controlling greenhouse gas emissions within several industrial sectors.[17] In addition to these efforts in California, a number of Northeastern and Mid-Atlantic states have become involved in a Regional Greenhouse Gas Initiative ("RGGI") to develop a model rule for regulating greenhouse gas emissions through a market-based emissions trading program designed to reduce carbon dioxide emissions by ten percent by 2019.[18]

While state and regional attempts at addressing greenhouse gas emissions may be laudatory, such efforts do not and cannot fully respond to the fundamental problem that greenhouse-gas-induced climate change is a global problem that requires global solutions. Only the federal government has the ability to legitimately engage the inter-

Utility Cap and Trade Act, S. 317, 110th Cong. (2007) (amending the CAA to establish a program to regulate the emission of greenhouse gas emissions from electric utilities); Ten-in-Ten Fuel Economy Act, S. 537, 110th Cong. (2007) (improving passenger automobile fuel economy and safety and reduce greenhouse gas emissions; Clean Fuels and Vehicles Act, S. 1073, 110th Cong. (2007) (increasing the supply of bio-diesel, E85, and other low-carbon fuel.); *see* U.S. Senator Diane Feinstein, Cal., Issue Statements – Global Warming: A Time to Act, http://feinstein.senate.gov/public/ (follow "Global Warming: A Time to Act" hyperlink under "Priorities" heading) (last visited Aug. 25, 2007).

14. *See* 38 Env't Rep. (BNA) 7, at 388–89, 393 (Feb. 16, 2007).

15. *See* CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2006).

16. *See id.* § 38561(a) ("On or before January 1, 2009, the [California Air Resources Board] shall prepare and approve a scoping plan . . . for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020 . . . ."); *see also id.* § 38550 ("By January 1, 2008, the state board shall . . . determine what the statewide greenhouse gas emissions level was in 1990, and approve . . . a statewide greenhouse gas emissions limit that is equivalent to that level . . . .").

17. *See id.* § 38560.5(a) ("On or before June 30, 2007, the state board shall publish and make available to the public a list of discrete early action greenhouse gas emission reduction measures that can be implemented prior to the measures and limits adopted pursuant to Section 38562.").

18. A proposed model rule was issued on August 15, 2006, and currently is being circulated among states participating in RGGI for possible statutory and/or regulatory implementation. Additional background information about RGGI, including a copy of the proposed model rule, can be obtained from RGGI, http://www.rggi.org (last visited Sept. 6, 2007).

national community on an issue as significant as climate change. However, because the federal government has failed to show the necessary political force on the matter, both state governments and various non-governmental organizations have decided to bypass the federal government and pursue progress on climate change, at both the national and international level, through the judicial system.

The most visible manifestation of this strategy is the decision of the United States Supreme Court in *Massachusetts v. EPA*.[19] This case addressed EPA's refusal to regulate tailpipe emissions from cars and trucks under section 202(a)(1) of CAA[20] because it lacked the authority to regulate tailpipe emissions.[21] A coalition of states, local governments, and private organizations challenged this claim.[22] On April 2, 2007, the Supreme Court held that EPA does possess the authority to regulate tailpipe emissions under section 202(a)(1).[23] While the Supreme Court's decision in *Massachusetts v. EPA* is limited to the regulation of motor vehicles under CAA, the decision suggests that the federal government also has the authority to regulate greenhouse gas emissions from stationary sources, such as coal-fired-electrical-power generation plants. For example, in *Coke Oven Environmental Taskforce v. EPA*,[24] ten states, two cities, and three environmental groups challenged EPA's refusal to regulate carbon dioxide emissions from power plants under EPA regulations governing stationary sources.[25] The D.C. Circuit stayed further proceedings in *Coke Oven* awaiting the Supreme Court's decision in *Massachusetts v. EPA*.[26]

19. 127 S. Ct. 1438 (2007).

20. 42 U.S.C. § 7521(a)(1) (2000).

21. *See* Massachusetts v. EPA, 127 S. Ct. at 1438.

22. *See id.* at 1446.

23. *See id.* at 1462.

24. No. 06-1131 (D.C. Cir. filed Apr. 7, 2006).

25. Petitioners in the *Coke Oven* case are challenging EPA's 2006 new source performance standards ("NSPSs") for certain utility and power plants. Petition for Review, Coke Oven Envtl. Task Force v. EPA, No. 06-1149 (D.C. Cir. filed Apr. 7, 2006). NSPSs set limits on emissions of certain pollutants from new (or significantly modified) stationary sources. Prot. of Env't, 40 C.F.R. §§ 60.1–60.20 (2006). Petitioners had asked EPA to promulgate standards for greenhouse gas emissions as part of the 2006 rulemaking, but EPA refused to do so, prompting the litigation over the final rule. In light of the Supreme Court's decision in *Massachusetts v. EPA*, the *Coke Oven* petitioners moved on May 2, 2007 to proceed with the litigation, asking the court of appeal to summarily vacate the NSPS rule and remand the matter back to EPA for further rulemaking proceedings. Motion Governing Further Proceedings, New York v. EPA, No. 06-1322 (D.C. Cir. filed Sept. 13, 2006).

26. Among the states' more novel attempts to address global warming through the courts are filing of common law tort actions against corporations whose activities or products generate significant greenhouse gas emissions. In *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), eight states (along with the City of New York

Citizens have long sought to shape national environmental policy through litigation brought under federal environmental statutes. The problem with cases like *Massachusetts v. EPA* is that the statute under which the litigation is brought inherently constrains the scope of the litigation. Litigation under CAA, for example, is constrained by the limits imposed by Congress on the authority of EPA to regulate specific sources of pollutants within the scope of EPA's jurisdiction. Such litigation cannot extend to matters outside EPA's statutory jurisdiction, such as sources of greenhouse gas emissions outside the United States, or even facilities within the United States that may not directly emit greenhouse gas but nonetheless contribute to atmospheric concentrations of greenhouse gas.[27] These limitations have prompted some litigants to look to more expansive legal frameworks to force action on global warming.

This Article examines various attempts to address climate change through the statutory framework established by the National Environmental Policy Act[28] ("NEPA") of 1969. NEPA is the first and most

and several land trusts) sued five large electric-power producers, alleging that carbon dioxide emissions from the defendants' fossil-fuel-fired generation plants constituted a public nuisance. *Id.* at 267. More recently, the State of California filed a nuisance action in federal court against six large motor vehicle manufacturers, making similar claims with respect to carbon dioxide emissions from cars and trucks. *See* Complaint for Damages and Declaratory Judgment at 4-5, *California v. Gen. Motors*, No. C06-05755 MJJ (N.D. Cal. Sept. 20, 2006), *available at* http://ag.ca.gov/newsalerts/cms06/06-082_0a.pdf. The court recently dismissed California's nuisance claim on the grounds that it "presents a non-justiciable political question." *See* Order Granting Defendants' Motion to Dismiss at 23, *California v. Gen. Motors*, No. C06-05755 MJJ (N.D. Cal. Sept. 17, 2007), *available at* http://www.cand.uscourts.gov/cand/judges.nsf/59881109e1fdb45688256d480060b737/61c396eab91211868825735900798cf7/$FILE/5755orderdism.pdf. The court was particularly critical of the state's claim for monetary damages, noting that

> the cases cited by Plaintiff do not provide the Court with [a] legal framework or applicable standards upon which to allocate fault or damages, if any, in this case. The Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result[s] from multiple sources around the globe. Plaintiff has failed to provide convincing legal authority to support its proposition that the legal framework for assessing global warming nuisance damages is well-established.

Id. at 21-22.

27. An example of a project that might not itself emit significant quantities of greenhouse gases but indirectly could affect global warming would be installation of a pipeline connecting elements of a larger oil-and-gas development project. Oil-and-gas pipelines transport hydrocarbons that eventually will be burned as fuels, producing carbon dioxide that might contribute to climate change. This is exactly the type of project addressed in the *Friends of Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007), litigation, discussed below.

28. 42 U.S.C. §§ 4321–4370 (2000).

wide-ranging of modern United States environmental laws. It not only establishes fundamental United States policy on environmental protection, but also compels federal agencies to promote that policy through a detailed review of the environmental impacts of their actions.[29] NEPA has long been used as a tool to challenge environmentally sensitive projects in the United States. As a result, a significant body of legal precedent has evolved to guide prospective litigants seeking to challenge new projects, both within and outside of the United States. At the same time, some of the more recent attempts to use NEPA as a means of responding to climate change have taken the law beyond anything Congress likely intended when it was enacted.

Part I of this Article provides an overview of NEPA and some of the issues raised in litigation brought under the statute to address climate change impacts. Part II reviews some of the more significant recent judicial decisions[30] that have attempted to grapple with these issues, with a focus on questions of standing, causation, and the character of projects that may or may not warrant NEPA review in a climate change context. Part III concludes, in light of these decisions, that while climate change impacts may well be a legitimate subject for consideration under NEPA, only changes in national and international policy are likely to have any real impact on the important problem of global warming.

I. Climate Change as an "Environmental Impact" Under NEPA

NEPA is the cornerstone of United States environmental law and policy. In part, NEPA requires all federal agencies to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[31]

29. *See id.*

30. *See, e.g., Mosbacher*, 488 F. Supp. 2d 889; Mayo Found. v. Surface Transp. Bd., 472 F.3d 545 (8th Cir. 2006); Power Plant Working Group v. Dep't of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

31. 42 U.S.C. § 4332(c).

As a general matter, evaluation of the environmental consequences of a proposed federal action is accomplished through the preparation of an environmental impact statement ("EIS").[32] A project proponent generally determines whether to prepare an EIS based on the results of an initial environmental assessment ("EA") of the project's potential environmental impacts.[33] If the agency determines, based on the EA, that an EIS is not required, it must make "a finding of no significant impact," a conclusion that the project will not have significant environmental impacts or that those impacts will be effectively mitigated through project modifications.[34]

Unlike other federal environmental laws, NEPA does not include a so-called "citizen suit" provision, a provision that allows private parties to initiate civil actions to enjoin compliance with a particular environmental law.[35] Instead, actions to prosecute claims for alleged NEPA violations must be brought under the Administrative Procedure Act ("APA"),[36] on grounds that a United States governmental agency has failed to comply with applicable procedural requirements in undertaking a particular administrative action.[37] Examples of NEPA actions challenged under APA include the issuance of a permit, approval of a federal program, and adoption of a federal administrative rule or regulation. Under APA, any person "aggrieved" by a federal agency action may bring a lawsuit to challenge the action as procedurally deficient or otherwise inconsistent with applicable law (including the provisions of NEPA).[38] Several cases brought by citizen

32. *See* 40 C.F.R. § 1501.4 (2006); *see also* Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

33. *See* 40 C.F.R. § 1501.4(c); *see also* Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 780 (10th Cir. 2006).

34. *See* 40 C.F.R. § 1508.13; *see also* Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005); Spiller v. White, 352 F.3d 235, 237 (5th Cir. 2003).

35. *See* Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990)) ("[N]o provision of NEPA explicitly grants any person or entity standing to enforce the statute."). An example of a citizen suit provision that has been widely used over the years is section 505 of the Clean Water Act, 33 U.S.C. § 1365 (2000). Section 505 provides,

> subject to certain limitations, that "any citizen may commence a civil action on his own behalf –(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to be in violation of [the Act], or (2) against the Administrator [of the United States Environmental Protection Agency] to perform any act or duty under this Act which is not discretionary with the Administrator."

Id.

36. 5 U.S.C. § 702 (2000).

37. *See Cetacean Cmty.*, 386 F.3d at 1176–77.

38. 5 U.S.C. § 702(a) (2000).

groups in the past five years have challenged particular NEPA decisions based, at least in part, on the federal agency's failure to properly consider issues related to climate change when making a decision pursuant to NEPA.

The cases that have addressed climate change and NEPA litigation have focused on two issues: first, whether plaintiffs have been or will be sufficiently injured by the potential impacts of a federal action on climate change to have standing to challenge that action in court; and, second, whether the alleged connection between the federal action and climate change is of the magnitude and type to warrant the kind of environmental review required by NEPA. As discussed in greater detail throughout the remainder of this Article, even where these challenges failed to overturn the particular action in question, they have proved effective in that the challenged agencies are likely to consider global warming when making NEPA-related decisions in the future.

II. Recent Significant NEPA Litigation

A. *Border Power Plant Working Group v. DOE*

Border Power Plant Working Group v. DOE (Border Power I)[39] is the first of several recent cases that have addressed climate change issues under NEPA. In *Border Power I*, the first of the two *Border Power* decisions, the court directly addressed both the issue of standing and the connection between the challenged federal action and global warming.[40] The case focused on the failure of the Department of Energy ("DOE") and the Federal Bureau of Land Management ("BLM") to prepare an EIS for the construction of transmission lines to connect new Mexican power plants to the California power grid.[41] DOE and BLM both independently prepared initial EAs for the project.[42] Based on the analysis contained in the EAs, both agencies issued a "finding of no significant impact," each of which concluded that NEPA required no further environmental review.[43] The plaintiff, an organization allegedly established for the sole purpose of challenging the

39. 260 F. Supp. 2d 997 (S.D. Cal. 2003).

40. *See id.*

41. *See id.* at 1006. DOE had been asked to issue "Presidential" permits to allow cross-border construction of the power lines. BLM had been asked to issue similar permits for necessary rights of way across lands within the United States where the lines would be located. *Id.*

42. *See id.* at 1008.

43. *Id.*

project, filed an action asserting that the agencies' NEPA review was inadequate because they failed to evaluate the impact of emissions from the Mexican power plants that would be generating the electricity transported by the transmission line project.[44]

The court first evaluated whether the plaintiff had standing under NEPA and APA.[45] Neither DOE nor BLM challenged the plaintiff's standing to bring the action in federal court.[46] However, the district court nonetheless independently determined that an evaluation of standing was necessary to establish jurisdiction over the plaintiff's claims.[47]

The court properly focused its standing analysis on the seminal 1992 United States Supreme Court decision, *Lujan v. Defenders of Wildlife*.[48] *Lujan* outlines several key criteria that plaintiffs traditionally have had to meet in order to establish standing:

> First, the plaintiff must have suffered an "injury in fact." The Supreme Court's opinions have defined such an injury as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Second, the injury must be fairly traceable to the challenged action of the defendants. Third, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[49]

The most important of these three criteria in procedural cases brought under NEPA and APA is the requirement of injury in fact. According to the Court,

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[50]

In the past, the Ninth Circuit Court of Appeals has emphasized the singular importance of injury in fact in procedural cases and reduced the elements that must be shown to establish procedural stand-

44. *See id.*
45. *See id.* at 1008–10.
46. *See id.*
47. *See id.* at 1008–11.
48. 504 U.S. 555 (1992).
49. *Border Power I*, 206 F. Supp. 2d at 1009 (citing *Lujan*, 504 U.S. at 560).
50. *Lujan*, 504 U.S. at 572 n.7.

ing to the following: the plaintiff must show "(1) that he or she is a 'person who has been accorded a procedural right to protect [his or her] concrete interests . . .' and (2) that the plaintiff has 'some threatened concrete interest . . . that is the ultimate basis of [his or her] standing.'"[51]

Having articulated the applicable requirements for standing, the court in *Border Power I* went on to find that the plaintiff, an association comprised of various individuals living near the proposed transmission project, met those requirements.[52] Ironically, it based that determination on extra-record declarations of association members that allegedly lived "near" the project, in either Imperial County, California or Mexicali, Mexico, and shared "a concern for the environmental health of the border region."[53] Beyond that, it did not discuss with any specificity how the proposed project in fact would result in a concrete injury that could form the basis for standing under *Lujan.* In particular, the court did not indicate that it considered the potential contribution to global warming by carbon dioxide emissions from the Mexican power plants as a basis for plaintiff's standing, even though it accepted plaintiff's evidence that carbon dioxide emissions "are the greatest by weight of all pollutants emitted by natural gas turbines" of the sort proposed for use in those facilities.[54]

After glossing over the standing question, the court next considered whether the alleged connection between the federal action and climate change warranted review under NEPA.[55] To reach this issue, the court first had to determine whether emissions from the proposed Mexican power plants were properly within the scope of environmental review,[56] because NEPA only applies to projects that are "subject to [federal] control and responsibility."[57] Because the proposed power plants were outside the jurisdiction of the United States, the court

51. Douglas County v. Babbitt, 48 F.3d 1495, 1500 (9th Cir. 1995) (citations omitted); *see also* Pac. N.W. Generating Coop. v. Brown, 25 F.3d 1443, 1450 (9th Cir. 1994) (holding that plaintiffs with an economic interest in preserving salmon have a procedural interest in ensuring that the Endangered Species Act is followed); Friends of the Earth v. U.S. Navy, 841 F.2d 927, 933 (9th Cir. 1988) (holding that residents who live near site of proposed port have procedural standing to sue for Navy's alleged failure to follow permitting regulations); City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (holding that city located near proposed freeway interchange has procedural standing to challenge agency's failure to prepare an EIS).

52. *See Border Power I*, 260 F. Supp. 2d at 1010–11.

53. *Id.* at 1010.

54. *Id.* at 1029.

55. *See id.* at 1012.

56. *Id.*

57. 10 C.F.R. § 1021.104(b) (2007).

concluded that they were properly excluded from the scope of the proposed federal action for NEPA purposes.[58] The court went on to conclude, however, that emissions from the plants could be considered as indirect or "cumulative impacts" of the proposed federal action and therefore should have been addressed in the EAs for the project.[59]

In reaching this conclusion, the court relied primarily on two previous Ninth Circuit decisions: *Sylvester v. U.S. Army Corps of Engineers*,[60] and *Wetlands Action Network v. U.S. Army Corps of Engineers*.[61] In *Sylvester*, the court held that federal agencies are required to consider the indirect or cumulative impacts of a project that is not within the defined scope of a "proposed federal action," if that project and another project that is within federal jurisdiction constitute "two links of a single chain."[62] The court stated that it is not enough if one project might "benefit from the other's presence."[63] The link between the two projects must be such that each action could not exist without the other.[64] In *Wetlands Action Network*, the court held that agencies are only required to consider impacts associated with a non-federal action if the causal linkage between the two is such that the non-federal action cannot proceed without the related federal action.[65]

The district court in *Border Power I*, relying on *Sylvester* and *Wetlands Action Network*, concluded that because one of the proposed Mexican power plants was planned to be constructed solely for purposes of supplying the United States energy grid over the proposed transmission line, the two projects were sufficiently linked to require consideration of the plant's emissions under NEPA.[66]

The court's discussion in *Border Power I* of the potential environmental impacts of power-plant emissions of carbon dioxide on climate

58. *See Border Power I*, 260 F. Supp. at 1013.

59. *See id.* at 1033.

60. 884 F.2d 394 (9th Cir. 1989). The *Sylvester* case did not specifically address whether impacts from projects outside the jurisdiction of the United States should be considered in connection with a related project within the United States; rather, it addressed whether impacts from an entirely private project (a resort complex), which did not need federal approval for other reasons, had to be considered in connection with a related project (a golf course) for which federal approval was required. *Id.* at 400. This factual distinction was not relevant, however, to the court's analysis of indirect and cumulative impacts in *Border Power I*.

61. 222 F.3d 1105 (9th Cir. 2000).

62. *Sylvester*, 884 F.2d at 400.

63. *Id.*

64. *See id.*

65. *See Wetlands Action Network*, 222 F.3d at 1118.

66. *See Border Power I*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003).

change was cursory, at best. The court simply noted: the "record shows that carbon dioxide is one of the pollutants emitted by a natural gas turbine and that it is a greenhouse gas," emissions from the turbines to be used at the proposed power plants in Mexico "have potential environmental impacts," and the government's "failure to disclose and analyze" the significance of carbon dioxide emissions is "counter to NEPA."[67] The DOE subsequently issued an EIS that included an evaluation of emissions from the proposed Mexican power facilities as part of its analysis of project alternatives, but initial claims attacking the document's cumulative impacts analysis were subsequently dropped.[68]

In its final decision, the court did not address the adequacy of the EIS's analysis of potential climate change impacts.[69] Given this outcome, *Border Power I* and *Border Power Plant Working Group v. DOE (Border Power II)*[70] are not particularly helpful as a guide to understanding how environmental impacts associated with climate change should be addressed under NEPA. However, the cases do suggest that an EA alone is unlikely to provide a sufficient level of environmental analysis, and that full consideration of the issue may require an EIS.

The significance of the *Border Power* decisions is that they are the first instances of a court confirming that climate change is a legitimate environmental issue that must be addressed by a government agency, at least at some level, when conducting the environmental assessment required by NEPA. Following the *Border Power* decisions, a federal agency preparing an EA or EIS pursuant to NEPA will be cognizant that failure to include a discussion of the impact of the proposed project on climate change may subject the agency to litigation. A discussion of impacts, however, is not synonymous with mitigation of impacts. As explicated in greater detail below, requiring the NEPA review process to include an assessment of the potential impact of a project on climate change does not mean that the agency proposing the project must actually reduce the greenhouse gas emissions from that project. Thus, cases such as *Border Power I* and *II*, while symboli-

67. *Id.* at 1028–29.

68. *See* Border Power Plant Working Group v. Dep't of Energy (*Border Power II*), 467 F. Supp. 2d 1040, 1046 (S.D. Cal. 2006).

69. *See id.* Plaintiffs challenged the EIS under NEPA, alleging that the EIS inadequately considered project alternatives and mitigation measures and an alleged failure to ensure the scientific accuracy of relied upon information. *Id.* at 1044-45. The court, however, rejected these challenges in all respects. *Id.* at 1045.

70. 467 F. Supp. 2d 1040 (S.D. Cal. 2006).

cally significant, illustrate that NEPA is an ineffective tool to address the impacts of federal agency actions on global warming.

B. *Mayo Foundation v. Surface Transportation Board*

Mayo Foundation v. Surface Transportation Board[71] more directly addresses the extent to which the agency proposing a major federal action that may affect climate change must include an analysis of the project's impact on climate change in its NEPA review.[72] *Mayo Foundation* involved a 2002 Surface Transportation Board ("Board") decision approving construction of a 280-mile rail line from South Dakota to the Wyoming Powder River Basin ("PRB").[73] The purpose of the project was to provide an additional means to transport low-sulfur coal from the PRB to coal-fired power-generation plants in the Midwest.[74] When the Board approved the project in 2002, a number of environmental groups brought suit challenging that decision on grounds that the EIS failed to fully analyze the likely environmental impacts of the project.[75] In 2003 in *Mid States Coalition for Progress v. Surface Transportation Board*,[76] the Eighth Circuit agreed and remanded the matter back to the Board for further environmental review.[77] Specifically, the court directed the Board to examine the likelihood that the existence of the rail project would result in lower rates for the transportation of coal into Midwest markets, causing potential increases in the use of coal for power generation purposes and commensurate increases in the emission of carbon dioxide from coal-fired power facilities.[78]

On remand, the Board directed the preparation of a supplemental EIS ("SEIS") to address the issues identified by the court.[79] As to the potential air impacts from increased coal usage, the SEIS included a quantitative sensitivity analysis on the effect of lower transportation rates on regional and national coal usage and found that "little additional coal would be consumed" due to the project.[80] The analysis also found that any change in PRB coal usage would translate to "minimal

71. 472 F.3d 545 (8th Cir. 2006).
72. *See id.*
73. *See id.* at 548.
74. *See id.*
75. *See id.* at 549.
76. 345 F.3d 520 (8th Cir. 2003).
77. *See id.* at 534.
78. *See id.* at 550.
79. *See Mayo Found.*, 472 F.3d at 549.
80. Dakota, Minnesota & Eastern R.R. Corp. Constr. Powder River Basin, Fin. Docket No. 33407, 2006 WL 383507, at *9 (Surface Transp. Bd. Feb. 13, 2007).

changes in air emissions from the electric power sector, both nationally and regionally."[81] The Board was cursory and dismissive in addressing the comments it received on the potential impact of increased emissions on global warming stating, "the scope of the air emissions analysis in the . . . SEIS was sufficiently broad, and there was no need for a full evaluation of global warming . . . as some of the commentators suggested."[82] Moreover, according to the Board, "the modest project-related increases in overall coal usage . . . imply that any impacts of this project on global warming . . . would necessarily be modest as well."[83] Based on the analysis of potential increased emissions provided in the SEIS, the Board issued a second decision approving the proposed PRB rail project. This second approval prompted another petition for review by the court of appeals.[84]

The Eighth Circuit's 2006 review of the Board's reauthorization of the PRB project affirmed the Board's decision in all respects, noting that the Board's decision and underlying environmental review documents "extensively discuss[ed] the potential impacts on air quality that may have resulted from implementation of the project."[85] The court further concluded that "the Board more than adequately considered the 'reasonably foreseeable significant adverse effects [of increased coal consumption] on the human environment' on remand."[86] It did not address, however, petitioners' specific arguments on the absence of any independent analysis of climate change impacts, apparently accepting the Board's position that those impacts could not have been significant enough to require any such analysis for purposes of a NEPA review.

The *Mayo Foundation* decision validates the notion that even generalized climate change impacts can, and should, be addressed pursu-

81. *Id.* According to the SEIR, "projected air emissions for sulfur dioxide, nitrogen oxides, carbon dioxide and mercury associated with the small increase of additional coal usage would be less than 1% . . . ." *Id.*

82. *Id.* at *12.

83. *Id.*

84. *See* Reply Brief for Petitioners Sierra Club and Mid-State Coalition for Progress at 4, Mayo Found. v. Surface Transp. Bd., 472 F.3d 545 (8th Cir. 2006) (Nos. 06-2031, 06-2032, 06-2047, 06-2048), 2006 WL 2788083, at *3–*4. Petitioners pointed out that "nowhere does the FSEIS address how burning millions of tons of additional coal might contribute to global warming." *Id.* Moreover, Petitioners complained that under the Board's analysis, "no future EIS would ever have to address the global warming implications of federal actions, since under federal law no federal agency has regulatory jurisdiction over carbon dioxide [as] an air pollutant." *Id.* Of course, Petitioners at the time were writing without the benefit of the Supreme Court's decision in the *Massachusetts v. EPA* case.

85. *Mayo Found.*, 472 F.3d at 556.

86. *Id.*

ant to the environmental analysis required under NEPA. *Mayo Foundation* set the stage for courts to conclude, in other circumstances, that climate change impacts are a necessary component of NEPA review. However, as the case illustrates, requiring a federal agency to revise its assessment of potential impacts to include a more detailed analysis of air impacts does not result in mitigation of those impacts. Challengers in *Mayo Foundation* thus forced a recognition, and not a reduction, of the potential impact of the project on global warming. *Mayo Foundation*, like *Border Power I* and *II*, further illustrates the ineffectiveness of litigation under NEPA as a tool with which to combat climate change.

C. *Friends of the Earth v. Mosbacher*

The most recent case to address the application of NEPA to global climate change is *Friends of the Earth v. Mosbacher*.[87] In two separate decisions, *Friends of the Earth v. Watson* (*Mosbacher I*)[88] and *Friends of the Earth v. Mosbacher (Mosbacher II)*,[89] the United States District Court for the Northern District of California addressed both of the central issues constraining the capacity of the courts to address climate change under NEPA: standing and sufficiency of the relationship between climate change and the proposed federal action.[90] On each issue, the district court stretched applicable law beyond anything Congress could have intended when it enacted NEPA in 1969. If allowed to stand on appeal, these decisions may subject a multitude of international projects that potentially affect climate change to stringent administrative review requirements under United States environmental laws. Moreover, these review requirements are enforceable through private party action in United States federal courts, even where United States interests are severely limited. In suggesting the possibility of mandatory environmental review for international projects, *Mosbacher* could undermine independent policy decisions to

87. 488 F. Supp. 2d 889 (N.D. Cal. 2007).

88. No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. 2005). *Mosbacher I* addressed defendants Overseas Private Investment Corporation ("OPIC") and Export-Import Bank's ("Ex-Im") motion for summary judgment. *Id.* at *1.

89. *Mosbacher II*, 488 F. Supp. 2d 889. *Mosbacher II* addressed plaintiffs' and defendants' motions for summary judgment. *Id.* at 891. The named defendant in *Mosbacher II*, Robert Mosbacher, Jr., replaced Peter Watson, named defendant in *Mosbacher I*, as President and Chief Executive Officer of OPIC. *See id.*

90. *Mosbacher I* focused almost exclusively on the standing issue. *Mosbacher I*, 2005 WL 2035596, at *3. *Mosbacher II* addressed more systematically the nature of the projects purportedly requiring environmental review and the role federal agencies played in supporting those projects. *Mosbacher II*, 488 F. Supp. 2d 889.

promote economic development in parts of the world where United States institutional support is most needed.[91]

1. Background

Plaintiffs, a group of cities and an environmental group,[92] brought an action against two quasi-governmental agencies to compel them to conduct EAs under NEPA to address the global warming impacts of projects supported by the agencies outside the United States.[93] Plaintiffs claimed that the impacts of global warming on the United States environment required the agencies to address global warming pursuant to NEPA, even though none of the projects supported by the agencies are located in the United States.[94] By making such an assertion, plaintiffs sought to extend NEPA's environmental review requirements to greenhouse gas-emitting projects, primarily but not exclusively energy related, located throughout the world, even where only very modest United States governmental interests are implicated.

Defendants, the Oversees Private Investment Corporation ("OPIC") and the Export-Import Bank of the United States ("Ex-Im"), are both independent government corporations.[95] OPIC's mission is to "mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies . . . ."[96] OPIC employs three basic tools to accomplish its mission: (1) political risk insurance covering currency inconvertibility, expropriation, and political violence; (2) financing through loan guarantees that provide medium- to long-term funding to ventures involving significant equity or management participation by United States businesses; and (3) direct loans to transac-

91. At a status conference on April 27, 2007, the district court indicated that it intended to certify both of its decisions for interlocutory appeal to the United States Court of Appeals for the Ninth Circuit. *See* Civil Minute Order, *Mosbacher I*, No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. 2005). The federal defendants have requested that the court defer certification until they can obtain necessary administrative approvals to pursue such an appeal. *See* Fifth Joint Case Management Statement and Proposed Case Management Order, *Mosbacher II*, 488 F. Supp. 2d 889 (N.D. Cal. 2007).

92. *See Mosbacher II*, 488 F. Supp. 2d at 891 n.1. The named plaintiffs were Friends of the Earth, Inc.; Greenpeace, Inc.; the city of Boulder, Colorado; and the cities of Arcata, Oakland, and Santa Monica, California. *Id.*

93. *See id.* at 892.

94. *See id.* at 897–901.

95. *See id.* at 893, 895.

96. 22 U.S.C. § 2191 (2000).

tions involving small United States businesses.[97] OPIC has no role in the development or approval of the projects for which an applicant might seek insurance or loan guarantees to cover the applicant's risk of project participation.[98] Notably, OPIC is prohibited from providing direct loans "to finance any operation for the extraction of oil or gas."[99]

Ex-Im's mission complements that of OPIC. While OPIC provides financial support for exports from the United States,[100] Ex-Im provides export credit insurance and guarantees to commercial banks and other financial institutions in connection with exports of United States capital goods and services, insurance products for short- and medium-term credits, direct loans, and guarantees for working capital loans made by commercial banks to United States exporters.[101] Both OPIC and Ex-Im have adopted guidelines requiring assessments of the environmental impacts of certain approved projects.[102] OPIC's guidelines were adopted pursuant to section 117 of the Foreign Assistance Act.[103] Under those guidelines, OPIC is required to conduct an "Environmental Impact Assessment," an "Initial Environmental Audit," or

97. *See id.* § 2194.

98. *See* Defendant OPIC's Cross Motion for Summary Judgment at 3, *Mosbacher II*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (No. 02-4106).

99. *See* 22 U.S.C. § 2194(c).

100. *See* 12 U.S.C. § 635 (2000).

101. *See Mosbacher II*, 488 F. Supp. 2d 889, 895 (N.D. Cal. 2007). One illustration of the role OPIC and Ex-Im play in supporting projects outside the United States, cited repeatedly by the parties and the district court, involved an oil pipeline in Chad and Cameroon (the "Chad-Cameroon Project") for which both agencies provided indirect financial assistance. *Id.* at 896. The Chad-Cameroon Project was part of a larger development project involving oil fields in Chad and oil-loading facilities off the Cameroon coast. *Id.* According to defendants, the cost of the Chad-Cameroon Project is estimated at $2.2 billion and the cost of the larger development project is estimated at $3.5 billion. *Id.* at 897. OPIC provided up to $250 million in political risk insurance coverage to a subcontractor in the Chad-Cameroon Project that provided oil field drilling and related services; however, the contract between OPIC and the subcontractor provided for a maximum payout of only $100 million, and the subcontractor was required to pay over $1 million a year to OPIC to maintain the insurance. *Id.* Additionally, the contract required the subcontractor to operate in compliance with World Bank pollution prevention and abatement guidelines and to notify OPIC immediately of any accident occurring during the performance of its services that "could reasonably be foreseen to have a material adverse impact on the environment." *Id.* at 898–99. Ex-Im separately provided a $200 million loan guarantee to a bank participating in the financing of the larger development project, but did not provide any direct financing for the project, or the component pipeline project. *Id.* at 898. The loan guarantee by Ex-Im was intended to cover only "political risks (primarily war and civil unrest, expropriation and transfer risks)" during the construction of the Chad-Cameroon Project and after the project was completed and operating. *Id.*

102. *See id.* at 893, 895–96.

103. 22 U.S.C. § 2151p.

both, for projects that are "likely to have significant adverse environmental impacts that are sensitive (e.g. irreversible, affect sensitive ecosystems, involve involuntary resettlement, etc.), diverse, or unprecedented."[104] Crude oil refineries, large thermal power projects, major oil-and-gas developments, and oil-and-gas pipelines are among the general types of projects that would qualify for this type of environmental analysis.[105] Projects not falling into these categories are subject to a less extensive environmental review.[106] Ex-Im's environmental review guidelines specifically require "adherence to [NEPA's] environmental review procedures" for long-term project financing, loans, and guarantees.[107] An environmental review is not mandatory for medium-term transactions, credit and working capital guarantees, and short-term insurance products.[108] Both OPIC and Ex-Im undertook analyses of the proposed projects challenged by plaintiffs under their respective environmental review guidelines.[109]

2. Standing in the Context of Global Climate Change

In *Mosbacher I*, OPIC and Ex-Im disputed plaintiffs' standing to challenge agency actions supporting a variety of unrelated, foreign energy-development projects.[110] In addition to the Chad-Cameroon Project,[111] the actions challenged by plaintiffs included: (1) loan guarantees to three mutual funds loaning money to an oil- and gas-development project in eastern Russia; (2) a loan guarantee to United States capital market investors loaning money to a trust funding an oil-and gas-development project in Indonesia; (3) guarantees for United States companies exporting services and equipment to support a project to enhance an existing offshore petroleum complex in Mexico; (4) guarantees for similar goods and services to develop oil fields and a small refinery in Venezuela; and (5) guarantees to a United States bank providing financing for the expansion of a coal-fired power plant in China.[112] The agencies claimed that, with respect to any of

104. *Mosbacher II*, 488 F. Supp. 2d at 894.
105. *See id.*
106. *See id.*
107. *Id.* at 896.
108. *See id.*
109. *See id.* at 896–97.
110. *See Mosbacher I*, No. C 02-4106 JSW, 2005 WL 2035596, at *2 (N.D. Cal. 2005).
111. *See Mosbacher II*, 488 F. Supp. 2d at 897–98.
112. *See Mosbacher I*, 2005 WL 2035596, at *1.

these projects, plaintiffs could not meet the three criteria for standing required under *Lujan*: injury in fact, causation, and redressability.[113]

On August 23, 2005, the district court denied defendants' summary judgment motion, rejecting their argument that plaintiffs lacked standing to bring an action against OPIC and Ex-Im.[114] Remarkably, the district court found that plaintiffs met all three criteria for standing under *Lujan*.[115] On the critical issue of injury in fact, the court found that because plaintiffs' NEPA challenge raised only "procedural issues," there was no requirement to show that a substantive environmental harm was imminent or that the agencies' support of foreign development projects would have "particular environmental effects."[116] Instead, all plaintiffs had to show was that it was "reasonably probable that the challenged action will threaten their concrete interests."[117] In that context, the court determined that plaintiffs had done enough to establish injury in fact as a basis for standing.[118] In support of its determination, the court noted that while "they concede that the impact of greenhouse gas emissions traceable to projects supported by OPIC and Ex-Im are not yet known with absolute certainty, Plaintiffs *contend* the only uncertainty is with respect to how great the consequences will be, and not whether there will be any significant consequences."[119]

The court listed a number of contentions, drawn from a series of one-sided declarations, on how much carbon dioxide would be emitted by the challenged projects, how greenhouse gases are the major contributor to global warming in the twentieth century, and how further increases in greenhouse gas emissions will continue to increase

113. *See id.* at *2 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

114. *See id.* at *8.

115. *See id.* at *2–4.

116. *Id.* at *2 (citing Cantrell v. City of Long Beach, 241 F.3d 674, 674 n.4 (9th Cir. 2001)); *see* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 972 (9th Cir. 2003) (requiring plaintiffs to prove that the challenged federal project will have particular environmental effects "would in essence be requiring that the plaintiff conduct the same environmental investigation that he [sic] seeks in his suit to compel the agency to undertake"). The irony, of course, is plaintiffs did not need to conduct any new environmental analyses to establish standing, since for each of the projects challenged by plaintiffs, OPIC and Ex-Im had already performed relevant environmental analyses. Had the court taken those analyses into account in its assessment of the issue, it would have made the court's determination that standing existed much more problematic.

117. *Id.* at *2 (citing Citizens for Better Forestry, 341 F.3d at 969–70); *see also* City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004).

118. *Mosbacher I*, 2005 WL 2035596, at *3.

119. *Id.*

global warming with widespread environmental impacts.[120] The court further asserted, "these impacts have and will effect [sic] areas used and owned by Plaintiffs."[121] On that basis, the court concluded that "Plaintiffs' evidence is sufficient to demonstrate that it is reasonably probable that emissions from the projects supported by OPIC and Ex-Im supported projects will threaten Plaintiffs' concrete interests."[122] The court failed to explain, however, what specific "concrete interests" are in fact being threatened. The plaintiffs may have a generalized interest in maintaining the stability of the global climate. However, it is entirely unclear that such an interest is sufficiently distinct from the interests of any other member of the public to confer standing to challenge agency actions in federal court.

The district court's approach to standing in *Mosbacher I* directly conflicts with the Supreme Court's analysis in *Lujan* and with other controlling precedent in the Ninth Circuit.[123] The district court's approach is instead similar to Justice Blackmun's dissent in *Lujan.* In his dissent, Justice Blackmun suggests that a procedural injury per se—essentially, a grievance by an environmental plaintiff premised solely on the failure of a government agency to follow pertinent administrative procedures—is sufficient to establish the injury in fact required to confer standing.[124] The majority opinion in *Lujan,* written by Justice

120. *See id.*

121. *Id.*

122. *Id.*

123. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992). Among other things, the district court ignored the principal articulated in *Lujan* and followed by the Ninth Circuit that suggests a close geographical or economic nexus between a proposed project and alleged injury, while not necessarily determinative, is important when the character of the injury is a procedural one. *See id.* at 560–61. None of the projects considered by the district court in *Mosbacher* have anything near the close geographic and/or economic connection with plaintiffs' interests identified in these cases.

124. According to Justice Blackmun, "as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement," and "[t]here is no room for a *per se* rule or presumption excluding injuries labeled 'procedural' in nature" as grounds to confer standing to plaintiffs in environmental cases." *Id.* at 606 (Blackmun, J., dissenting). Justice Blackmun stopped short, however, of suggesting that procedural injuries without some connection to a substantive harm, albeit an implicit one, are sufficient in this context. *Id.* ("There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant."). Justice Blackmun somewhat dramatically concluded his dissent in the *Lujan* case by stating "I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

Scalia, expressly rejected this approach, stating, "[w]e do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[125]

More importantly, the *Lujan* Court was very direct in stating that,

> [A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[126]

Therefore, the plaintiff lacks standing to challenge the government's actions in federal court.[127] The district court in *Mosbacher I* provided no explanation as to how plaintiffs in that case had been harmed by the global warming impacts of the projects at issue in any way that was distinct from harms arguably caused to United States citizens generally. Nor did the court explain why the relief plaintiffs sought provided any greater benefits to them than it would to any other member of the public. In the absence of such explanation, it is hard to see how the *Mosbacher I* plaintiffs could possibly establish sufficient injury in fact to meet the standards set by the Supreme Court in *Lujan.*

It is important to note that the Court's recent decision in *Massachusetts v. EPA* does not in any way lower the requirement of *Lujan* that litigants demonstrate injury in fact in environmental cases.[128] Of the twelve states, four local government entities, and variety of environmental and public interest groups which joined the litigation as plaintiffs, only the Commonwealth of Massachusetts was found to have standing to seek redress for its alleged climate change-related injuries under CAA.[129] The Court based its decision on two grounds: first, the fact that Massachusetts was a sovereign state and not a private litigant, as was the case in *Lujan* and is also the case in *Mosbacher*;[130] and sec-

125. 504 U.S. at 573 n.8.

126. *Id.* at 573–74.

127. *See id.* at 577–78.

128. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1452–57 (2007).

129. *See id.* at 1441.

130. *See id.* Massachusetts' status as a sovereign state is critical to the Court's ultimate finding of standing. According to Justice Stevens, "[w]e stress here . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." *Id.* at 1454. The Court cited Justice Holmes's decision in the seminal case of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("This is a suit by a State for an injury to it in its capacity of *quasi-*

ond, the fact that only Massachusetts had demonstrated a sufficiently particularized injury to meet the injury in fact requirement articulated in *Lujan.*[131] Justice Stevens, who wrote for the majority, was persuaded to grant Massachusetts standing based in part on the State's argument that it was jeopardized imminently by rising sea levels, which "have already begun to swallow Massachusetts' coastal land."[132] Moreover, those changes had, and would continue to have, a direct and particularized impact on Massachusetts, which owns a substantial portion of the State's coastal property and operates or maintains a wide variety of coastal-related public resources and infrastructure.[133]

Plaintiffs in *Mosbacher I,* by contrast, alleged only diffuse and generalized environmental impacts that could apply to anyone in the United States. In support of their cross-motion for summary judgment, plaintiffs rely on a series of supporting declarations asserting that their organizational members "own" or "use and enjoy areas that are, or will, be affected by climate change" and that "[e]ach of the member Plaintiffs *expresses a belief* that the Defendants' action *increase* (sic) *the risk* that their concrete interests will be harmed."[134] Declarations submitted by several of the municipal plaintiffs assert that "critical infrastructure components are, or will be affected by climate change, limiting their ability to provide municipal services, such as water and sewer service, and requiring up-grades to existing infrastructure."[135] Yet nowhere do plaintiffs explain with any particularity what the alleged effects specifically might be. As the federal defendants pointed out, none of the declarations relied upon by plaintiffs showed specific facts to support their contention that they would be "'directly' affected apart from their 'special interest in the subject'" of

sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." (emphasis added)). The Court also observed that "[j]ust as Georgia's 'independent interest . . . in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today." Massachusetts v. EPA, 127 S. Ct. at 1454.

131. *See* Massachusetts v. EPA, 127 S. Ct. at 1441.

132. *Id.* at 1442.

133. *See id.* at 1456 n.19.

134. Plaintiffs' Cross-motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment at 13, *Mosbacher I,* 2005 WL 2035596 (N.D. Cal. 2005) (No. 02-4106). According to plaintiffs, even the professional interests of their members will be harmed by climate change. *Id.* ("Climate change is currently harming and will continue to harm me because its effects contribute to diminished opportunities for fundamental biological research and my ability to pursue my profession."). How that specifically might happen is left entirely unclear.

135. *Id.* at 14.

the agency actions at issue.[136] This failure, in conjunction with their status strictly as private parties and local governmental entities, suggests compellingly that the plaintiffs in *Mosbacher* do not have standing and should not have been allowed to prosecute their NEPA claims against OPIC and Ex-Im, even after the Court's decision in *Massachusetts v. EPA*.[137]

3. Major Federal Actions Affecting Global Warming

In its March 30, 2007 decision, *Mosbacher II*,[138] the district court held that NEPA requires OPIC and Ex-Im to address the impacts of greenhouse gas emissions from fossil-fuel projects the agencies support in developing countries where such projects constitute "major federal actions" for NEPA purposes.[139] Between 1990 and 2001, Ex-Im allegedly provided over $25 billion in loans and financial guarantees to 474 fossil-fuel projects.[140] Between 1990 and 2006, OPIC allegedly

136. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 8, *Mosbacher I*, 2005 WL 2035596 (N.D. Cal. 2005) (No. 02-4106) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992)).

137. In addition to injury in fact, the district court found that the requirements to show causation and redressability under *Lujan* also were met in *Mosbacher I*. *Mosbacher I*, 2005 WL 2035596, at *2–3. On the causation issue, the court essentially relied on nothing more than a few self-serving public relations statements to suggest a causal link between the foreign energy projects at issue and the ancillary actions of OPIC and Ex-Im to support those projects. *Id.* at *4 ("For example, Ex-Im has stated that it 'supports export sales that otherwise would not have gone forward.' And OPIC has stated that when it determines which projects to support, it evaluates them 'to ensure they would not have gone forward but for OPIC's participation.'" (record citations omitted)). As discussed above, however, OPIC and Ex-Im rarely, if ever, provide direct financial support to foreign development projects, and the indirect support the agencies do provide is seldom crucial to the viability of a project. It is difficult to imagine that the types of projects supported by OPIC and Ex-Im would not go forward (and the associated environmental impacts not occur) simply due to the absence of support from those agencies; indeed, the court acknowledged evidence submitted by the agencies that "generally, for the large energy-related projects referenced in Plaintiffs' complaint, third parties have already completed basic design and planning stages for the projects before applying for financial support from Ex-Im or OPIC." *Id.* On the issue of redressability, the court simply found that because "OPIC and EX-Im's decisions *could be* influenced by further environmental studies, Plaintiffs' [sic] have sufficiently demonstrated redressability." *Id.* at *4 (emphasis added). In that context, the district court simply ignored the Supreme Court's guidance in *Lujan*, where it held that plaintiffs face a particular burden in establishing redressability for the impacts of a foreign project where United States agencies "supply only a fraction of the funding for [the] foreign project." Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992).

138. 488 F. Supp. 2d 889 (N.D. Cal. 2007).

139. *Id.* at 909–10.

140. *See* Plaintiffs' Motion for Summary Judgment at 10, *Mosbacher II*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (No. 02-4106), 2005 WL 3971170 (citing U.S. GENERAL ACCOUNTING OFFICE, Export-Import Bank, Energy Financing Trends Affected by Various Factors 5 (2002)).

provided financial support to sixty-four fossil-fuel projects that will contribute nearly eighty tons of carbon dioxide emissions annually.[141] Plaintiffs maintained that greenhouse gases from projects supported by OPIC and Ex-Im constituted roughly eight percent of 2003 global emissions,[142] although they conceded that they cannot quantify the precise impacts of such emissions on the domestic environment.[143]

The district court found that while both OPIC and Ex-Im are subject to NEPA, the record contained insufficient evidence to determine whether the projects cited by plaintiffs are major federal actions and thus subject to NEPA review.[144] The court rejected plaintiffs' contention that defendants operated energy "programs" that may require preparation of a programmatic EIR under NEPA, noting that the various energy projects supported by defendants were not "a group of concerted actions to implement a specific policy or plan."[145] The *Mosbacher II* court specifically declined to accept the contention that fossil-fuel-based energy projects supported by defendants were components of a larger action intentionally divided by defendants into multiple actions, and held that the projects lacked the geographical or temporal nexus required to make proposed actions "cumulative actions" subject to a single EIS.[146]

The court next considered whether individual projects could be considered major federal actions in and of themselves, focusing in particular on the amount and nature of funding provided for the projects by OPIC and Ex-Im. The court concluded that it was unable to determine, based on the record, whether the amount of financing provided by defendants was sufficient to render the projects major federal actions, although it also found that the viability of the projects absent defendants' support indicated that defendants lacked the control and responsibility necessary for the court to conclude that the projects were major federal actions.[147] The court thus held that plaintiffs failed to demonstrate that the projects were major federal actions and that defendants failed to show that the projects were *not* major

141. *See id.* at 12.

142. *See Mosbacher II*, 488 F. Supp. 2d at 902.

143. *See Mosbacher I*, 2005 WL 2035596, at *3.

144. *See Mosbacher II*, 488 F. Supp. 2d at 912–19.

145. *Id.* at 909 (quoting 40 C.F.R. § 1508.18(b)(3) (2006)).

146. *Id.* at 919.

147. *See id.* at 918–19.

federal actions.[148] What this means as a procedural matter in a case brought under APA is unclear. The decision suggests that the determination of whether a project is a major federal action can be a matter for which evidence outside the administrative record must be considered by a trier of fact other than the governmental agency that considered the action in the first place.

The court's decision effectively to defer consideration of the "major federal action" issue in this case to future judicial proceedings is difficult to understand given the clarity of Ninth Circuit precedent on the issue. Under NEPA's implementing regulations, "major federal action" is defined to include not only projects "approved" by a federal agency, but also projects that are "entirely or partly financed, assisted, conducted, regulated or approved" by the federal entity.[149] In *Ka Makani 'O Kohala Ohana, Inc. v. Water Supply (Ka Makani)*,[150] however, the Ninth Circuit has made clear that a "federal funding contribution alone" cannot transform an entire project into a major federal action.[151] Where final decision-making authority remains at all times with a non-federal entity, the provision of financial or other assistance to that entity does not constitute "discretionary involvement or control over" a project sufficient to render it a "major federal action" under NEPA.[152] Later district court decisions following *Ka Makani* have suggested that to transform a federally-funded project by a non-federal entity into a "major federal action" for NEPA purposes, the

148. *See id.* at 919. While the court in *Mosbacher II* denied plaintiffs' motion for summary judgment, it granted in part and denied in part the government's cross-motions. *Id.* at 891.

149. 40 C.F.R. § 1508.18(a) (2006); *see also* U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 763–64 (2004) ("Major federal action is defined to 'includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility.'" (citing 40 C.F.R. § 1508.18)).

150. 295 F.3d 955 (9th Cir. 2002).

151. *Id.* at 960. The *Ka Makani* case involved limited funding and advisory support by two federal agencies—the U.S. Geological Service ("USGS") and the Department of Housing and Urban Development ("HUD")—in connection with an assessment of groundwater availability to support a state agency's proposed water diversion project. *Id.* at 958. The two agencies contributed approximately $1.3 million to support the proposed project, less than two percent of the total estimated project cost of $80 million. *Id.* at 960.

152. *Id.* at 961; *see also* Sierra Club v. Babbit, 65 F.3d 1502 (9th Cir. 1995). Plaintiffs there challenged a BLM decision, based on an EA under NEPA, to allow construction of access roads on federal forest lands, even though plaintiffs argued that the construction could have an adverse affect on species protected under the Federal Endangered Species Act ("ESA"). *Id.* at 1506–07. Because the project proponent had a preexisting right to develop the roads (based on contracts that pre-dated NEPA), the court found that BLM did not have the right to exercise control over the project to the degree needed to subject it to NEPA's further procedural requirements. *Id.* at 1513.

amount of federal financing must be "overwhelming" and the capacity of the federal agency to exercise control and responsibility over the project, through oversight in the use of federal dollars, if not direct decision-making, must be clear.[153]

The requisite elements of discretionary involvement and control identified in these cases are simply not present in *Mosbacher*. In the Chad-Cameroon Project, for example, OPIC's financial involvement was indirect and modest at best—approval of $250 million in political risk insurance, not direct financing, to a United States subcontractor on a foreign-development project worth billions.[154] The same was true for Ex-Im's support—a $200 million loan guarantee, again for political risk management, again no direct financing.[155] In no case cited by the court could OPIC's and Ex-Im's financial support be considered "overwhelming." More significantly, in no case did OPIC or Ex-Im have discretionary control over a decision to proceed with a project.

The court dedicated only a footnote to the key issue of whether NEPA is the correct tool with which to address global warming.[156] Defendants claimed that the impacts of global warming on the domestic environment ostensibly caused by the projects they support are too remote and speculative for analysis under NEPA.[157] The court did not address the remote and speculative nature of plaintiffs' claims or the wisdom of using NEPA to address global warming. Rather, the court chose a superficial analysis: given that projects supported by OPIC and Ex-Im emit greenhouse gases and greenhouse gases contribute to global warming, are the agencies' actions a "but for" cause of the emissions from such projects?[158] The court failed to answer even this question, stating that, since it could not determine whether the viability of the projects depended upon defendants' support or whether defend-

153. *See, e.g.*, Sierra Club v. U.S. Fish & Wildlife Serv. ("USFWS"), 235 F. Supp. 2d 1109 (D. Or. 2002). In that case, USFWS was contributing seventy-five percent of the cost of a State of Oregon study of local elk populations. *Id.* at 1121. The court found that the "overwhelming percentage of federal dollars involved . . . is probably sufficient to 'federalize' the project." *Id.* The court also found that the USFWS had the ability to control the project through its oversight function. *Id.* ("Monitoring to ensure compliance demonstrates the ability to control the manner in which the study is being conducted because if the study is not being conducted in compliance with the plan as proposed, the implication is that the [US]FWS will no longer fund it.").

154. *See Mosbacher II*, 488 F. Supp. 2d 889, 897 (N.D. Cal. 2007).

155. *See id.* at 898.

156. *See id.* at 918 n.19.

157. *See id.*

158. *Id.* (citing Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004), concluding that, where an agency has limited authority over the relevant action to prevent a certain effect, the agency "cannot be considered a legally relevant 'cause' of the effect").

ants could exercise significant control over the projects they support, it could not determine whether defendants are a "legally relevant cause of the alleged effects on the domestic environment."[159]

The court's holding implies that OPIC and Ex-Im may be required to conduct an environmental review pursuant to NEPA for every application for assistance related to the power sector. The time and cost involved in the preparation of an EA under NEPA guidelines may discourage OPIC and Ex-Im from considering fossil-fuel projects in developing countries, to the substantial detriment of the people in those countries who would most directly benefit from the projects. In addition, sponsors from countries where lesser or no comparable environmental review is required may become more attractive than United States agency sponsors, resulting in potentially less rigorous scrutiny of the environmental impacts of fossil-fuel projects and correspondingly less pressure to mitigate those impacts on the global environment.

The most disturbing aspect of the *Mosbacher* decisions is the facile application of what is essentially a domestic environmental-review program, designed to apply to domestic projects with discernible domestic impacts, to projects outside the United States with environmental impacts that are amorphous and not distinctly linked to environmental conditions within the United States. Generally, incremental environmental impacts in the United States are not "reasonably foreseeable" impacts proximately caused by agency action.[160] Fundamentally, global warming is a cumulative impact that cannot be traced to the impact of a particular project on the other side of the world. Under NEPA, a project proponent typically evaluates cumulative impacts by looking at a range of current and reasonably foreseeable future projects; given the vast number and variety of actions in the United States and abroad currently contributing to global climate change, an evaluation of cumulative impacts is not realistically possible.

In sum, the *Mosbacher* decisions are symbolic attempts to force United States government agencies to address global warming. As noted above, requiring such agencies to review climate change as an environmental impact under NEPA will lead only to a recognition of the issue, not a strategy to mitigate the issue. Perhaps more importantly, the piecemeal approach represented by cases such as *Mosbacher*,

159. *Mosbacher II*, 488 F. Supp. 2d at 918 n.19.

160. 40 C.F.R. § 1502.22(b) (2006).

and evidenced by the use of litigation to combat global warming in general, is opposite to the comprehensive, international response required to address global warming.

III. Conclusion

Clearly, climate change and its anthropogenic causes are no longer a matter of serious scientific dispute. Just as clearly, existing governmental and intergovernmental measures (such as the Kyoto Protocol) have yet to show themselves to be efficacious in dealing with the problem of climate change. Given the gap between the problem as now recognized and the capacity of available policy tools to confront the problem, the impulse to fill that gap through judicial action under statutes like NEPA is entirely understandable. Under the appropriate circumstances, there is little doubt, for example, that: (1) the impact of greenhouse gas emissions on climate change is an issue properly within the scope of NEPA's environmental-review requirements; (2) greenhouse-gas-emitting projects outside the jurisdictional boundaries of the United States can be the subject of those requirements; and (3) private action by United States citizens can be a legitimate vehicle for forcing extra-jurisdictional consideration of climate change impacts.

Nevertheless, the courts should be careful to recognize that NEPA-based environmental review and litigation strategies have inherent limitations as weapons to be used in the war against global warming—both domestically and internationally. After over a quarter century of judicial development, the rules governing standing and project scope for environmental review purposes are well established. As well articulated in *Border Power I and II, Mayo Foundation,* and *Mosbacher I and II,* the courts generally have framed those rules in the context of relatively localized impacts from domestic projects with a substantial federal connection within the United States. These rules are clearly not intended to apply to highly-generalized impacts associated with a global phenomenon like climate change, caused by both domestic and internationally-related activities diffusely spread across the planet. In the case of agencies like OPIC and Ex-Im, a requirement to prepare detailed EAs under NEPA for proposed fossil-fuel or other greenhouse-gas-related projects will not appreciably reduce global warming. Such agencies have little capacity to influence either the construction or day-to-day operation of the projects they support, and mandating that they conduct a particularized environmental review for a proposed international project will not necessarily reduce

the amount of greenhouse-gas-emissions from that project in any appreciable way.

Global warming may well be the most important environmental challenge this country will ever face. However, established legislative and regulatory strategies, developed to address different issues at a different time in the nation's history, cannot be relied upon to meet that challenge. The focus must shift from litigation to new and credible policy responses that will allow society to effectively manage the consequences of the environmental changes that now seem inevitable as a result of global warming. Initial steps, in California, elsewhere in the United States, and internationally, have begun, but hard work remains.